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[New York]

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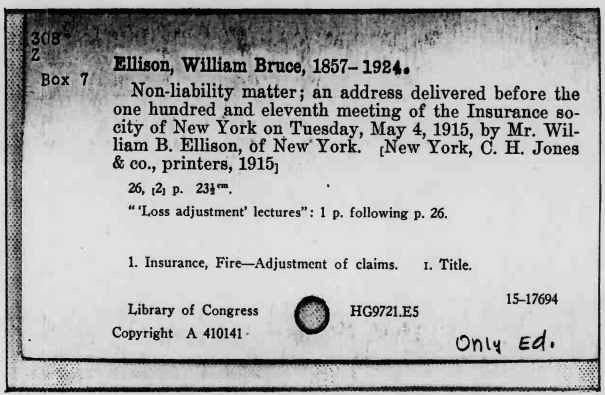

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Non-Liability Matter

AN ADDRESS

Delivered before the One Hundred and Eleventh Meeting

OF

The Insurance Society of New York

ON

Tuesday, May 4, 1915

BY

Mr. William B. Ellison

OF

New York

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Non-Liability Matter.

Mr. Chairman and Gentlemen:

I consider it no mean compliment to be invited to address you on some of the questions that arise under the standard fire insurance policy of this State. I, however, approach my subject with no inconsiderable diffidence,—1st, because of the splendid addresses that have been made before you by those who have preceded me, and 2nd, because I am in the presence of an audience whose knowledge of my subject may, and in all probability does, far exceed my own. Out of the latter proposition, however, I have this consolation,—that if I err, I will not in all probability mislead.

It may be well at the outset to divide and discuss in their respective order the provisions of the policy to which I am expected to address myself, and if I understand them correctly, they are as follows:

First: That the insurer shall not be liable for loss caused directly or indirectly by order of any civil authority.

Second: The insurer shall not be liable for loss by explosion of any kind unless fire ensues, and in that event, for the damage by fire only.

Third: If the subject of insurance is a building, and it or any part thereof fall, except as the result of fire, all insurance on such building or its contents shall immediately cease.

Fourth: The insurer shall not be liable for loss occasioned by ordinance or law regulating the construction or repair of the building in question.

First.

Loss by Order of Civil Authority.

The situation existing prior to the insertion of the provision against loss caused by civil authority, may be readily understood by perusal of the case of:

City Fire Ins. Co. vs. Corlies,
21 Wendell (N. Y.) 367.

In this case, the action was on a policy which insured the plaintiff against loss or damage by fire on certain earthenware in crates contained in a brick, slated store at No. 75 Pearl Street, New York.

On the trial, it appeared that in the great fire on the morning of December 17th, 1835, the store No. 75 Pearl Street was blown up with gunpowder and the goods insured totally destroyed. The explosion was ordered by the Mayor of the City to arrest the progress of a fire then raging to the east of this store. The building next to the store, but not the store itself, was on fire at the time of the explosion and the buildings all around this store in every direction took fire and were more or less burned or totally destroyed by the course of the flames; and according to every probability, the fire would have destroyed the store in question with its contents, had it not been blown up.

The defendant moved to dismiss the plaintiff's complaint on each of the following grounds:

(1) That the loss did not arise from a cause contemplated by the policy, but was a remote consequence of the fire not necessarily arising from it.

(2) The mere fact of bringing gunpowder upon the premises suspended the policy, although deposited without the knowledge of the plaintiff.

(3) A loss by explosion of gunpowder cannot be said to be a loss by fire, and those cases in which a recovery can be had where the goods have been destroyed not by fire, but by water or by breakage or the consequences of the fire, are cases where the injury arose in the attempt to save the goods insured; here the goods insured were intentionally destroyed to save the property of others.

(4) The act was done by the Mayor by virtue of his office for the benefit of the citizens at large, and the corporation of the City is liable for his acts even at common law independently of the statute; if he had no authority, then his own was an usurped power, which is expressly excepted by the policy.

(5) This fire was a general calamity, and property destroyed to put an end to it should be a general tax on the citizens and not a partial one on this insurance company; and in a doubtful case a policy should be so construed as to lay a general rather than a partial contribution.

The learned Court with the foregoing questions before it and speaking through Mr. Justice Bronson, said:

> "There has, I think, been a loss by the peril insured against, within the meaning of the policy. In *Grim v. Ins. Co.*, 13 Johns, 451, no doubt seems to have been entertained, either by the court or counsel, that a loss by

the explosion of gunpowder was a loss by fire. And in *Waters v. Ins. Co.*, 11Pet. 213, the point was so adjudged. The court was of opinion that fire was the proximate cause of the loss.

II. According to the terms of the policy, if the building was used for the purpose of storing gunpowder, the contract was, for the time, suspended. And see *Duncan v. Ins. Co.*, 6 Wend., 488. But placing gunpowder with a lighted match in the building, for the express purpose of producing an explosion, which immediately followed, was a very different thing from what the parties contemplated when they inserted this provision in the contract. Whether the insurers are liable for this voluntary destruction of the property, is a question yet to be considered. But I think it quite clear that they have not established the allegation that the building was used for the storing of gunpowder.

III. The building containing the goods was destroyed by order of the mayor of the city, for the purpose of arresting the progress of a conflagration. Are the insurers answerable for this voluntary destruction of the property? This question has been presented in a double form—the one supposing that the mayor acted with and the other that he acted without authority.

1. Let us first assume that the mayor acted illegally. If the fire had been kindled by an incendiary, it is not denied that the insurers would be answerable. Why are they not then answerable, if the mayor acted without authority? The act, though not done for a wicked purpose, was as illegal as though it had been the work of a felon. The answer attempted is, that although the mayor had no authority, yet as he acted *colore officii*, this is a case of loss happening by means of usurped power, which is expressly excepted by the policy.

It is impossible to maintain that a mere excess of jurisdiction by a lawful magistrate, is the exercise of an usurped power within the meaning of this contract. That is not what the insurers had in mind when they made the exception. It was an usurpation of the power of government against which they intended to protect themselves. Such was the interpretation given to the same words in a policy as early as the year 1767. *Drinkwater v. London Assur.*, v. 2 *Wils.*, 363. The property insured was destroyed by a mob, which arose on account of the high price of provisions; and the insurers were held liable, notwithstanding a proviso in the policy that they would not answer for a destruction by "usurped power." Bathurst, J. said those words, according to the true import thereof and the meaning of the parties, could only mean an invasion of the Kingdom by foreign enemies to

give laws and usurp the government, or an internal armed force in rebellion, assuming the power of government, by making laws, and punishing for not obeying those laws. Wilmot, Ch. J., said the words meant an invasion from abroad, or an internal rebellion, when armies are employed to support it; when the laws are dormant and silent, and the firing of towns is unavoidable. In *Langdale v. Mason*, 2 Marsh. Ins., 791, it was said by Ld. Mansfield, that these words were ambiguous, but they had been the subject of judicial determination; that they must mean rebellion conducted by authority—determined rebellion, with generals who could give orders. And he added: "usurped power takes in rebellion, acting under usurped authority." Whatever doubt there may have been originally about the meaning of the words "usurped power," in a policy, their legal import had been settled long before this contract was made; and we cannot assume that these parties used the words in any other than their legal sense.

2. But the mayor acted under lawful authority; there was no usurpation of any kind. Whether he had the concurrence of two aldermen, as the statute provides, or not, there can be no doubt of his common law power, as the chief magistrate of the city, to destroy buildings, in a case of necessity, to prevent the spreading of a fire. Indeed, the same thing may now be done by any magistrate, or even by a citizen without official authority. *Mayor of N. Y.* v. *Lord*, 17 Wend., 285.

IV. If the mayor acted by lawful authority, it is then said that the property was destroyed for the benefit of the city, and that the Corporation (not the insurers) must bear the loss. This case does not fall within the statute charging certain losses on the city, because it does not appear that the mayor had "the consent and concurrence of any two aldermen," 2 R. L., 368, sec. 81; and for the further reason, that the property would have been consumed by fire if its destruction had not been ordered by the magistrate. *Mayor of N. Y.* v. *Lord*, 17 Wend. 285. It is said that the Corporation is liable at the common law for the acts of the mayor; but no authority was cited in support of the position, and I am not prepared to say that, in a case like this, the doctrine can be maintained. The inclination of my mind is strongly the other way.

But suppose the city is liable, I do not see how that fact can affect this contract. If the insurers pay the loss they may, perhaps, have an action against the Corporation of the city, in the name of the assured, to recover back the money. *Mason* v. *Sainsbury*, 2 Marsh. Ins., 794; S. C., 3 Doug. 61. But however that may be,

the fact that the assured may have a remedy against the City, cannot change or qualify the undertakings of the insurers.

This leads me to notice a little more particularly the extent of the contract. The Co. agrees to make good unto the assured all such loss or damage to the property as shall happen by fire. Thus far, there is no limit or qualification of the undertaking. If the loss happen by fire, unless there was fraud on the part of the assured, which is not pretended in this case, it matters not how the flame was kindled. Whether it be the result of accident or design—whether the torch be applied by the honest magistrate, or the wicked incendiary—whether the purpose was to save a city, as at N. Y., or a country, as at Moscow—the loss is equally within the terms of the contract. That the insurers intended the general undertaking should extend to every possible loss by fire, is evident from the fact, that they afterwards proceed to specify particular losses by fire for which they will not be answerable. *Ins. Co.* v. *Lawrence*, 10 Pet., 507. The exceptions are contained in the sixth condition of the proposals annexed to the policy. It is unnecessary to recite the clause, because it is not pretended that this case comes within any of the exceptions, save that relating to a loss happening by means of "usurped power," and that point has already been considered.

There has then been a loss by fire. The case falls within the general undertaking of the insurers, and is not affected by any of the exceptions which they thought proper to make to the extent of their liability. We cannot add another exception. The insurers are bound by their contract."

The foregoing authority has been accepted throughout substantially the whole of the United States as correctly defining the law on the questions there at issue. One illustration is the case of:

Portsmouth Ins. Co. vs. Reynolds,
9 Ins. L. J. 606.

Mr. Justice Burks speaking for the Supreme Court of Appeals of Virginia, said:

"The general undertaking extends to all loss by fire from whatever cause, unless occasioned by the fraud or design of the insured. As was said by Judge Bronson in City Fire Ins. Co. vs. Corlies, 21 Wen., 367, the company agrees to make good unto the assured all such loss or damage to the property as shall happen by fire.

Thus far, there is no limit or qualification of the undertaking. If the loss happen by fire, unless there was fraud on the part of the assured, it matters not how the

> flame was kindled, whether it be the result of accident or design, whether the torch be applied by the honest magistrate or the wicked incendiary, whether the purpose was to save a city, as at New York, or a country, as at Moscow, the loss is equally within the terms of the contract. That the insurers intended the general engagement should extend to every possible loss by fire, is evident from the fact that they afterwards proceed to specify particular losses by fire for which they will not be answerable. See also Ins. Co. of Alexandria vs. Lawrence, 10 Peters, pp. 517-518."

To meet the construction thus given to the insurance contract referred to, and to obviate the situation that was thus created, there was inserted in policies subsequently written in one form or another, the provision now contained in the standard form of policy of this State, which is intended to and does relieve the insurer from loss under similar circumstances, and I do not find that the validity of the clause in question has been successfully questioned. Indeed, it has been sustained in the case of

Conner vs. Manchester Assur. Co.,
33 Ins. L. J. 844.

In this case, Chief Justice Gilbert, speaking for the United States Circuit Court of Appeals in the 9th Circuit, said:

> "It is contended, further, that the property was not directly or indirectly destroyed by order of civil authority; that there was no law authorizing the supervisors of a county to destroy the property of the citizens thereof; and that the property of the plaintiffs in error was destroyed by accident or neglect, and without their fault. The record of the findings of the trial court shows that the fact was established that the fire was started under an order of the supervisors of the county. The statutes of California of 1897 (pp. 465, 466, c.277) confer authority upon the supervisors of a county to provide for the destruction of insects injurious to fruit trees, vines or plants, and to make and enforce local police, sanitary and other regulations not in conflict with general laws. But whether or not there was lawful authority to start the fire which indirectly caused the damage in this case, there was *de facto* authority. The order was, in fact, made, and made by the officers to whom the said powers were given, and thereby the loss occurred. This, we think, excuses the insurance company: Barton vs. Home Ins. Co., 42 Mo. 156. The facts that the loss was the result of a fire started on other property, and that the property of the plaintiffs in error was not ordered to be burned, do not render the exemptions of the policy inapplicable. There was but one fire. It was ordered by civil authority. It

> indirectly caused the loss, and there was no intervening cause: Insurance Co. vs. Boon, 95 U. S. 117; Grand Trunk R. R. Co. vs. Richardson, 91 U. S. 454; Krippner vs. Biehl, 28 Minn. 139."

It is also interesting to note that in the case of

Hocking vs. British Am. Assur. Co.,
40 Ins. L. J. 799,

Mr. Justice Gose, speaking for the Supreme Court of Washington, says, that the word "indirectly" was not limited in its application to "invasion, insurrection, riot, civil war or commotion," but was equally applicable to a loss caused by "order of any civil authority." In discussing this phase of the case then under consideration, the learned Justice said:

> "It bases its exemption upon the following facts: The insured died of smallpox the day preceding the fire, and was removed from the house for burial about one hour before the fire occurred. The fire resulted from a fumigation of the house ordered by the board of health. At the close of plaintiff's testimony, a judgment of nonsuit was entered. The plaintiff has appealed.
>
> The appellant first contends that the word 'indirectly' has reference only to the causes preceding the phrase 'or by order of any civil authority'; that this is made plain by the use of the word 'by' in the phrase last quoted, and that the exemption in that clause is available only in case of loss occurring 'directly' by order of some civil authority. It is also said that the clause 'or by theft' gives support to this view. We think that such a construction would do violence to the language which the parties have seen fit to use, and that it would be also a strained and unnatural interpretation of their meaning. As was said in Insurance Co. vs. Boon, 95 U. S. 117, 24 L. Ed. 395; 'Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured.'
>
> It is also contended that the proximate cause of the fire was the negligence of the health officer, and that the fire was not even the indirect result of the order of the board. It is argued that the exemption was only intended to apply to a case where the property is destroyed by some direct act of the civil authority to prevent the spread of fire or disease or such like. We think the contention is not sound. Putting aside refined distinctions, it is obvious that the preponderating or producing cause of the fire was the order of the board of health directing its inferior officers to fumigate the house. The civil au-

thority put its own agency into operation, and the fire was the indirect result. There was no intervening cause. The proximate cause is the efficient cause, the one which puts the other causes into motion. Conner vs. Manchester Assur. Co., 130 Fed. 743, 65 C. C. A., 127, 70 L. R. A., 106, is in point. In that case the defendant had insured a crop of grain for the plaintiff against loss or damage by fire. By order of the board of supervisors of the county in which the insured property was situate, a fire was started in the grass upon certain pasture land at a point three or four miles distant from the land upon which the plaintiff's grain was situated for the purpose of destroying grasshoppers and averting the disaster which their presence threatened. The fire got beyond control, spread to the plaintiffs' land, and burned their grain. The policy contained a clause identical with the one under consideration. In applying it to the facts in the case, the court said: 'The facts that the loss was the result of a fire started on other property, and that the property of the plaintiff in error was not ordered to be burned, do not render the exemptions of the policy inapplicable. There was but one fire. It was ordered by civil authority. It indirectly caused the loss, and there was no intervening cause'—citing Insurance Co. vs. Boon, 95 U. S. 117, 24 L. Ed. 395; Grand Trunk R. R. Co. vs. Richardson, 91 U. S. 454, 23 L. Ed. 356. See also, Barton vs. Home Ins. Co., 42 Mo. 156, 97 Am. Dec. 329. The case of Insurance Co. vs. Boon, supra, contains an exhaustive discussion of the principles applicable in stipulations like the one under consideration, and supports the view announced in the text."

Just how far the courts might go to sustain the clause in question where there was merely an assumption of "civil authority" as distinguished from real authority, offers a grave question, and I am inclined to assume that the burden would rest on the insurer to prove that those directing the act out of which the loss in question grew, had authority so to do.

In the case of

American Central Ins. Co. vs. Stearn's Lumber Co.,

41 Ins. L. J. 125,

Chief Justice Hobson, speaking for the Court of Appeals of Kentucky, and discussing the question as to whether the direct or indirect destruction of the property insured by persons unauthorized, or in other words without "civil authority," but assuming to have such authority, would relieve the insurer from liability under its policy, said:

"The house was burned by order of the marshal. The power of the marshal in such cases is thus defined

by statute: 'The marshals and their deputies shall have in each state the same powers in executing the laws of the United States as sheriffs and their deputies in such state may have by law in executing the laws thereof.' U. S. Compiled Statutes 1901, §788.

The power of the sheriff in executing a criminal process is covered by section 4583 of the Kentucky Statutes, and section 40 of the Criminal Code: 'In executing a writ of habeas corpus or any criminal or penal process requiring an actual arrest, the sheriff or other officer may break open the outer or any other door of the dwellings or other house of the defendant, or of any other person, if it be necessary to enable him to make the arrest.' Ky. St. 4583 (Russell's St. §256). 'To make an arrest, an officer may break open the door of a house in which the defendant may be, after having demanded admittance and explained the purpose for which admittance is desired.' Criminal Code, §40.

It will thus be seen that the marshal's power is the same as the sheriff's, and that neither is authorized to burn a building in making an arrest. In Goodman vs. Condo, 12 Pa. Super. Ct. 466, the court had before it the liability of a sheriff, in a case like this, for burning down a house in which a felon was secreted in order to arrest him. The court held the Sheriff liable for the loss of the building. It said: 'The sheriff in this case does not rely upon any law which required this particular act, causing the damage to be done, and prescribing the manner in which it should be done. He stands, therefore, just as any other resident of the village in which these occurrences happened would stand, so far as any right to destroy property is concerned. It is true it was his official duty to arrest the felon; but so was it the duty, though not official, of the resident to do the same thing. To enable him to perform his duty, he has been clothed with ample power, for the whole *posse comitatus* is at his command. He may break open doors in order to follow felons, and if they are killed, provided they cannot be otherwise taken, it is justifiable, though if they kill him whilst he is endeavoring to arrest them it is murder. Brooks vs. Commonwealth, 61 Pa. 352 (100 Am. Dec. 645). The law, since it has thus invested him with such ample power, has not gone further and authorized him to destroy property when such destruction simply removes somewhat of the danger involved in the performance of his duty. The arrest of a felon is always attended with some danger, but this is an incident of the office of sheriff. Its extent is reduced to a minimum by the great power given to him, but it is obvious that it cannot be removed entirely. This burned house did not threaten the life of the sheriff. It was the desperate man

within it. It is true the house furnished some measure of protection to the man within, whilst accomplishing his lawless purpose; but its destruction can in no sense be said to have removed a danger which threatened the sheriff's life. So long as the lawless purpose existed, so long was there danger to the sheriff. It is evident, therefore, that the only purpose of destroying the house was to render the arrest less dangerous. In this respect, it was simply an aid to and in ease of the sheriff, and upon principle must be paid for by him. Where he incurs expense or inflicts damage for the purpose of aiding him in the performance of his duties, he is liable personally unless the law has provided otherwise. Rausch vs. Ward, 44 Pa. 389.'

The deputy marshal in the case before us had no more authority to set the house on fire than the sheriff in the case cited. The loss of the house was not due, directly or indirectly, to the order of any civil authority; for the marshal had no authority to burn the house. He was not a civil authority for this purpose. The rioters were in the house; the marshal's posse, acting under his orders, were not rioters. The loss of the house was not due, directly or indirectly, to the riot carried on by the men within the house. It was due directly to the wrongful act of the marshal in setting fire to the house without authority. The riot within the house was the occasion of his wrongful act, but the loss of the house was not the proximate result of their unlawful acts. The loss of the house was the direct result of another's unlawful act, which intervened between their act and the burning of the house. The unlawful act of the marshal in setting fire to the house was the cause of the loss. It necessarily follows that the insurance company was not released from liability by the clause of the policy above quoted."

The case of American Central Ins. Co. vs. Stearn's Lumber Co., just quoted from, must, however, be read in conjunction with the law as laid down in the case of City Fire Ins. Co. vs. Corlies, hereinbefore reviewed, where the court in meeting the charge that the Mayor of the City had had no authority to order the destruction of the building in question, said:

"But the Mayor acted under lawful authority; there was no usurpation of any kind. Whether he had the concurrence of two aldermen, as the statute provides, or not, there can be no doubt of his common law power as the chief magistrate of the City to destroy buildings in case of necesssity to prevent the spreading of a fire. Indeed, the same thing may be done by any magistrate or even by a citizen without official authority. Mayor of N. Y. vs. Lord, 17 Wend. 285."

This phase of the question is not without its difficulties, but time will not permit me just now to discuss it further.

Second.

Loss by Explosion.

The earliest policies contain no clause with reference to liability for losses from explosions, and as a rule it was then held that such a loss was not one for which the insurer was liable.

An exception was made, however, where the explosion was itself caused by fire.

And where the loss resulted partly from explosion and partly from combustion, it was held to be within the terms of a policy insuring against "loss or damage by fire."

13 Am. & Eng. Encyc. of Law, 132-133.

In the later policies, as in the standard form, the insurer against fire stipulates for exemption from liability from explosion. And in the great majority of cases where this clause has been under consideration, it has been upheld and a recovery from loss by explosion denied.

Briggs vs. N. A. etc. Ins. Co.,
53 N. Y. 446.
St. John vs. Am. Mut. Ins. Co.,
11 N. Y. 516.
Strong vs. Sun Mut. Ins. Co.,
31 N. Y. 103.
Evans vs. Columbian Ins. Co.,
44 N. Y. 146.

There is a wealth of other authority to support the clause in question.

The case of

Hustace vs. Phenix Ins. Co.,
175 N. Y. 292,

is now most frequently cited as an authority on the proposition now under discussion, but this decision must be taken with some caution for two reasons,—first, the plaintiff stipulated himself out of court by conceding that before ignition, the explosion in question "caused said building to fall and become a total loss," and second, the clause in question as it appears in the standard form of policy, was apparently not correctly printed in the papers on appeal.

It is quite clear that when the insured stipulated, as he did, that his building had become a total loss by reason of the

explosion in question before any fire occurred, he put himself out of court.

You will also find upon a careful perusal of the *Hustace* case, that the clause relating to the loss by explosion was printed in the papers on appeal with the punctuation so changed as to materially affect the construction that should be given thereto.

Chief Justice Parker, writing for the Court of Appeals, quoted the clause as it was apparently before him, in these words:

> "This company shall not be liable for loss caused directly or indirectly by invasion; insurrection; riot; civil war or commotion; military or usurped power; or by order of any civil authority; or by theft; or by negligence of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by a fire in neighboring premises; or (unless fire ensues and in that event for damages by fire only) by explosion of any kind; * * *."

The clause, however, as contained in the standard form is as follows:

> "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; * * * or (unless fire ensues and in that event for the damage by fire only) by explosion * * *."

It will thus be readily observed that the semi-colons placed after the words "invasion," "insurrection," "riot," "civil war or commotion" and "military or usurped power," are errors that crept into the record. There should have been commas in place of semi-colons. As the court read the record, it held the words "directly or indirectly" applicable to loss by explosion as well as to loss caused by "invasion," "insurrection," "riot," "civil war or commotion," "military or usurped power," "or by order of any civil authority." Furthermore, as the court apparently read the record, the insurer was not liable for even the loss by fire that followed the explosion, although the policy itself clearly provides the contrary. By express words, the insurer is liable in case fire ensues for all damage caused by the fire in question. Such a loss is undoubtedly "indirectly" caused by the explosion, and the Court of Appeals apparently fell into error in so construing the policy as to make the word "indirectly" applicable to a loss by explosion.

The Hustace case, as all of you remember, grew out of the explosion in the Tarrant Building on October 19th, 1900, and considerable litigation followed.

The attorney for Hustace, as I have before stated stipulated himself out of court by conceding that his building was a total loss caused by the explosion before ignition, but other attorneys were not similarly caught, as evidenced by the result of the case of

Eppens, Smith & Wiemann Co. vs. Hartford Fire Ins. Co.,
99 App. Div. 221.

In the case just cited, counsel for the assured raised the issue that the explosion in the Tarrant Building caused the ignition of the Eppens, Smith & Weimann Building, and that the loss therein was caused solely by fire. And further, that the fall of the building or such portions of it as fell, were the result of internal combustion.

The Eppens, Smith, Weimann case was very hotly contested and had a more or less varied career.

At the first trial had before the late Mr. Justice Amend, approximately thirty members of the Fire Department decked out in the full splendor of their uniforms, testified more or less consistently to the effect that immediately upon the happening of the explosion the Eppens, Smith, Weimann Building, with others, immediately collapsed, and then followed some fire in the ruins. This testimony was met by about an equal number of civilian witnesses, and with the case in that shape it was after a trial lasting substantially a week, submitted to the jury who found for the defendant.

The learned court, however, at the instance of defendant's counsel, had charged the jury among other things, as follows:

> "That if the front or Warren Street wall of the Fahys Building, or a substantial part thereof, was shattered before fire had consumed this property, the verdict must be for the defendant."

Immediately following the verdict of the jury and the entry of judgment thereon in defendant's favor, the insured took an appeal to the Appellate Division of the Supreme Court, First Department, where the judgment in question was reversed on the ground that the wall in question might well have been "shattered" and not yet "fall."

The Appellate Court therefore held that the charge to the jury by the learned Trial Judge to the effect that if the jury found that the wall had been "shattered" was reversible error and a new trial was ordered.

On the retrial of the case, which was before Mr. Justice Dowling, now of the Appellate Division, there was substantially

the same conflict in testimony and the result was a disagreement of the jury.

Following the inability of the jury to agree, the case was submitted to Mr. Justice Dowling alone on the testimony taken before him and the jury, and after the submission of briefs, a decision was rendered in favor of the assured which was later affirmed by the Appellate Division and the Court of Appeals.

From the foregoing, it is clear that the provision in the standard policy which eliminates loss by explosion is valid and has been sustained by ample authority, but at the same time it is always imperiled by the assured raising the issue as to whether or not the loss was caused by the explosion or by fire accompanying or immediately following the same.

THE "FALL" CLAUSE.

As all of you are no doubt aware, the standard form of policy provides that the insurer shall not be liable under the following condition:

> "If a building or any part thereof fall except as the result of fire, all insurance by this policy on such building or its contents, shall immediately cease."

The language used is clear and explicit, and in my opinion the clause is entirely valid and effective.

Its application, however, was questioned in the case of

Leonards vs. The Orient Ins. Co.,

30 Ins. L. J. 980,

where Chief Justice Woods, speaking for the United States Circuit Court of Appeals in the Seventh Circuit, said:

> "In Dows vs. Insurance Co. (127 Mass. 346), where the action was upon fire policies containing a clause concerning explosions like that in the policy before us, it was said, on the authority of Scripture vs. Insurance Co. (10 Cush., 356) that, 'the explosion in the upper story having been caused by fire, the insurers, if no clause had been inserted restricting their liability for losses by explosion, would have been liable for the losses, whether by the explosion or by the subsequent fire, to the amount of the insurance.' One of the policies also contained the provision,
>
> > 'If a building shall fall, except as the result of fire, all insurance by this company on it or its contents shall immediately cease and determine.'
>
> in respect to which it was said:
>
> 'The question is whether this last provision is applicable to the facts of the case, and in the opinion of the majority of the judges, it is not. The provision, being introduced by the insurers and for their benefit, is,

by a familiar rule, to be construed, in case of ambiguity, most strongly against them. It appears to us to have had in view the case of a building falling by reason of inherent defects, or by the withdrawal of the necessary support, as by digging away the underlying or adjacent soil. It might, perhaps, include the case of a building thrown down by a storm or flood or earthquake. But it would be construing this provision too liberally in favor of the insurers to hold it to include the case of the destruction of a building by an explosion within the building itself, and of a fire immediately ensuing upon and connected with such an explosion, the measure of the liability for which has been carefully and precisely defined in the previous provisions of the policy.'

The fact that in the present case the explosion occurred outside of the building in which the insured goods were kept cannot affect the liability of the insurer, if otherwise liable, for the loss by fire which immediately ensued. If there had been no fall of the building or of any part of it, and the flame attending or ensuing upon the explosion had reached the insured goods through an open door or window, liability under the policy for the loss would be beyond dispute. It is to be said that there is no liability simply because the first effect of the explosion was to break a passageway into the building for the fire, which, in a few moments, followed? Confessedly, there would be liability if the flame had entered through any opening, caused or not caused by the explosion, if no part of the building had fallen; but should there be no liability if a piece of glass falling from a window shattered by the explosion had given admission to the flames? The language of the contract is clear that if any part of the building shall fall, except as the result of fire, all insurance on building or contents 'shall immediately cease.' The words are surely, as they have been declared to be, 'terse and expressive.' They are unqualified and universal, admitting of neither interpretation nor construction, and, if applicable, it would seem, should be allowed their literal significance. It is not to be said that they are applicable, and yet not to be applied literally. It may not be said that 'any part' of a building must be deemed to mean an important part, or such a part as might cause, or be supposed likely to cause, or at least to enhance the danger of, loss by fire. 'It was competent for these parties to fix the terms of their agreement.' Where they wrote and subscribed 'any part,' they must be presumed to have meant any part, great or small, if observable or readily discoverable. Even if it could be said that the part must be large enough to cause or to be likely to enter into the risk of loss by fire, the qualification could mean little, because conditions are

readily supposable, and are not improbable, in which the fall of material of small weight or bulk would be enough to start a fire. Not much is necessary to overturn a stove or to scatter the fire of an open grate or hearth, and still less to ignite a match. If there had been a window on the west side of the building in question, the falling of a shutter or of a pane of glass would probably have been followed by the same loss to the plaintiff in error which ensued upon the falling of the corner of the building. On the theory of strict adherence to the meaning of plain words, these propositions cannot well be denied; and upon that theory the case of Kiesel & Co. vs. Sun Ins. Office of London (31 C. C. A., 515) is urged upon our attention in support of the ruling below. The case, however, is not in point. The policy there in suit contained the clauses now under consideration; but, there having been no explosion, the building fell, and the goods insured were burned, and the question was whether the fall was caused by the fire or by a gale of wind. It is, perhaps, worth while, however, to observe that the literal significance of the contract seems to have been departed from when it was said in the opinion that if the building 'was on fire, and if it would have fallen by force of the wind if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable.' Any question of *non sequitur* in the statement aside, it is certainly not inconsistent with the express terms of the contract that in such a case the insurer should be liable for the damage done before the fall occurs, though not caused by the fire. The insurance ceases only at the instant of the fall, and it follows, on a strict construction, that 'the cause of the fall' can be the test of liability only from that instant. The case before us is one of destruction by fire, which immediately followed, and with propriety may be said to have been caused by, an explosion. Whether that explosion was caused by fire, it is not necessary for the present purpose to consider. See Briggs vs. Insurance Co., 53 N. Y., 446. The liability of the insurance company for fire immediately ensuing upon an 'explosion of any kind or lightning' was 'carefully and precisely defined' in a clause devoted to the subject; and we agree with the opinion in Dows vs. Insurance Co., supra, that the succeeding clause, whatever its construction when applicable, should not be deemed 'to include cases of destruction by explosion and by fire ensuing upon and immediately connected therewith.' In this way the two clauses may well stand together, neither interfering with the legitimate office of the other; while if the latter is to be applied and enforced according to its literal meaning in every case where, by reason of an explosion, or otherwise, the building, or a

part of it, falls just before or during a fire, which otherwise would be within the contract, it will lead to results which the parties to policies may not both be supposed to anticipate, and which the courts need not and should not prove."

The meaning and effect of the "fall" clause was well defined by Judge Lacombe, in Western Assurance Co. vs. Mohlman, 83 Fed. Rep. 811, where at page 819, he said:

> "What does this particular clause mean, 'If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease?' Manifestly, it does not merely provide that the insurer will not be liable for the particular variety of loss by fire which results from a fall. It stipulates for very much more, viz., that the contract, which it is expressly provided shall normally continue for a year, shall, in the event of a fall, absolutely cease and determine, so that if a fall shall take place which in no way injures the property insured and it be thereafter destroyed by fire happening otherwise than by fall or from prohibited causes, the insurer is, nevertheless, not liable, because an event has happened which, by agreement of the parties, put an end to the contract altogether."

In Kiesel vs. Sun Insurance Office, 88 Fed. Rep., 243, the Court, speaking through Judge Sanborn (p. 245) says:

> "No words occur to us more apt, terse, and expressive than those contained in the policy with which to answer this question: 'If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.' If the building falls before the goods insured are damaged by fire, and if the fall is not caused by fire, from that instant the insurance ceased.
>
> The purpose of parties to an insurance policy in making their contract is to indemnify the insured against all destruction or damage caused by fire, but to give no indemnity against any destruction which resulted from other causes. Naturally the dominant thought throughout the entire agreement and hence the key to its interpretation and the measure of the liability of the company under it, is the cause of the destruction or damage. Generally speaking, if that cause is fire, there is liability. If fire is not the cause, there is no liability. In the particular clause in issue in this case the same purpose controls, the same key interprets, the same test determines the liability. If the fall of the building was caused by fire, then the defendant was liable, whether the goods insured were burned before or after the fall; but if the fall occurred before the fire attacked the goods, and if

that fall was caused by an earthquake, by a waterspout, by a cyclone or by any other cause than fire, the express agreement was that, when the fall occurred, the insurance ceased and there was no liability, if the building was on fire, and if it would not have fallen without the fire, its fall might well be said to have been the result of the fire; but if it was on fire and if it would have fallen by the force of the wind, if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable."

In Nelson vs. Traders Fire Insurance Co., 86 App. Div., 66, the east wall of the building, which was the east wall of a hotel, collapsed, causing the stores immediately above and some portion of the roof, or stories over the plaintiff's store to fall into the hotel premises. A fire started in the ruins and in attempting to extinguish it the insured property was damaged. The plaintiff's property was in no manner injured by the falling walls, and but for the fire they would have suffered no damage. It was held that the plaintiffs were not entitled to recover upon the policy.

At page 68, the Court said:

"That the risk of fire is greatly increased by the collapse of a portion of a building is self-evident. In fact, in the case at bar, except for such collapse, no fire would have resulted and no damage would have been done to the plaintiff's property. But whether the falling of the building, or a part of it, did or did not increase the hazard, it is unimportant to inquire. The defendant had a right to provide that its liability should cease immediately upon the happening of such event, if its intention so to do was expressed in clear and unambiguous terms in the contract of insurance. We think such is the clear meaning of the language employed. 'If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.' A part of the building in question fell, not as a result of fire, and the defendant simply asks that it be determined that all insurance by this policy (the policy in suit) on the contents of such building ceased immediately upon the falling of a substantial part of such building."

The Court then refers to the Kiesel case (88 Fed. Rep., 243, supra), and after approving of its doctrine, at page 271, concludes:

"In the case at bar, a substantial part of the building in which the plaintiff's property was located fell, not as the result of fire, and by the express terms of the policy it is provided that thereupon the insurance upon

such property which is a part of the contents of the building immediately ceased. We think a reasonable interpretation of the clause in the policy compels us to hold that immediately upon the falling of the east half of the building in question, the insurance upon plaintiffs' property ceased."

It is true that in the case of Western Assurance Co. vs. Mohlmann Co., 83 Fed. R., 811, it was held that the burden of proof was upon the defendant to establish that the building fell by a cause other than fire, but the explosion clause of the standard policy was not in any way involved in that case. When, however, a case like the one now before the Court came before the United States Circuit Court Judge Wallace presiding, for decision, Judge Wallace distinctly and unequivocally ruled that the existence of the explosion clause changed the rule which had been adopted in the Mohlmann case, and that, when it, the explosion clause, was present for consideration and a factor in the situation, the burden of proof was upon the plaintiff.

In the case of Mattlage vs. German American Insurance Co., tried before Judge Wallace and a jury on April 7, 1904, Judge Wallace said:

"Ordinarily, I should say that the defendant had the burden of proof upon this issue, but the case is somewhat peculiar one in one respect. The fall of the building, if it did fall, until it was destroyed by fire, was caused by an explosion, and if it was caused by an explosion, the damage ensuing must fall upon the plaintiff, because the defendant is exonerated under its contract."

Loss Occasioned by Ordinance or Law Regulating Construction or Repair.

The liability of the insurer under our form of policy is subject to the following provision:

"This company shall not be liable * * * for loss occasioned by ordinance or law regulating construction or repair of buildings * * *."

The provision just quoted, has been the subject of very spirited dispute so far as its application and effect is concerned, throughout the various jurisdictions in the United States and elsewhere, and it may not yet be said that the matter is entirely clear.

Judge Deitch, in his Lectures on "The Standard Fire Insurance Policy," said:

"On those policies not containing the above provision, the company is liable for a total loss in those cases where a building is damaged to such an extent as to come within the law or ordinance forbidding its repair.

Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103.

Larkin v. Glens Falls Ins. Co. (Minn.), 29 Ins. L. J. 833.

Brady v. Ins. Co., 11 Mich. 445.

Monteleone v. Ins. Co., 47 La. Ann, 1563.

Fire Ass'n v. Rosenthal, 108 Pa. St. 474.

These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurance company is bound thereby. The company is entitled to what remains of the building or to have the value of what remains deducted from the recovery. The rule announced in the above cases would not apply in case of a loss where the above provision appears in the policy. The object of the insertion of this provision in the New York standard form of policy (and the same provision is found in nearly all of the other standard forms of policies) was to avoid the rule announced in these cases."

In discussing a somewhat similar condition, Mr. Milnes, in his hand-book entitled "Fire Loss Settlements," states the law as follows:

"A Company electing to rebuild after a fire occupy precisely the same position the Insured would if rebuilding apart from one, as regards any disability or stipulation imposed by any Local Authority. The Insured might be required to set back to a new street line, or to leave for the future a certain portion of the site, formerly built upon, uncovered. By thus restricting the area of the new building a reduction might be effected in the cost. The Company would be entitled to the benefit of this reduction, whether they elected to reinstate or adjusted the loss upon a cash basis. If, by reason of the regulations of any Local Authority, the cost of rebuilding be increased, the liability of the Company does not follow such increase, but stops at what it would have cost to rebuild had such regulation not been in force."

In the case of:

McCready vs. The Hartford Fire Ins. Co.,

61 A. D. (N. Y.) 583,

Mr. Justice Patterson, in speaking for the full court, said:

"The real question upon this branch of the case is: What is the measure of liability of the defendant under its policy? The plaintiffs insist that it is the value of the building as it stood just before the fire. Under the terms and conditions of the policy in suit, which is in the standard form required by the law of the State of New York, the parties have themselves agreed upon the

measure of liability, the extent of it being distinctly provided for by a stipulation in the policy binding upon both parties. * * *. By this stipulation the parties settled for themselves the measure of damages in case of loss. The plaintiffs expressly agreed that the indemnity to be furnished by the policy should be the sum that it would cost the insured to repair or replace the building with material of like kind and quality. That was the construction given to the policy by the trial judge, who, in charging the jury, repeatedly stated to them that on the question of damages the consideration by which they were to be governed was, what it would cost to restore the building after the fire in order to place it in the same condition in which it was before the fire with respect to the quality and kind of material. * * *. The standard form of policy was prepared under the authority of chapter 488 of the Laws of 1886, and the use of that form is made by statute obligatory upon all companies doing business of fire insurance within the State of New York. When the policy of insurance in this case was issued, therefore, not only was the measure of damage a stipulation of the policy, but the law respecting fire-proof buildings had been in operation for many years and the standard policy was adopted in view of existing provisions of law and of the decisions of the courts of the State of New York concerning the extent of the liability of fire underwriters.

We will assume that the ordinary rules of construction apply to all the provisions of the standard policy, and that interpretation will be made in favor of the assured and for the purpose of granting him stipulated indemnity for his loss, and that but for the stipulation the measure of indemnity would be the difference between the actual cash value of the property just before the fire and its value after the fire if there is a partial loss; but here the parties have agreed to a particular limitation of the liability which 'in no event' shall exceed the amount to be ascertained within that limitation. The stipulation does not refer to an election by the insurer to rebuild, but to the measure of the liability of the underwriter.

We think the construction given to the policy by the trial judge was right, and that the issue to be determined by the jury was properly put before them."

Judge Cooley, in his Briefs on the Law of Insurance, at page 3050, discusses the question now under consideration and concedes that the provision of the policy barring loss caused by ordinance or law regulating construction or repair is valid and effective.

Mr. George A. Clement, in his excellent work on "Fire Insurance as a Valid Contract," Vol. I, p. 111, states the rule as follows:

> "The limitation in the standard policy that the liability of the company 'shall *in no event* exceed what it would then cost the insured to repair or replace the same with material of like kind and quality' does not refer to cases where the company elects to rebuild, but fixes the measure of liability in all cases, and is not affected by a local statute in force when the standard policy was prescribed, governing the construction, alteration, or removal of buildings."

A case very frequently referred to affecting this question is that of

Larkin v. Glens Falls Ins. Co.,

29 Ins. Journal, p. 833,

where Mr. Justice Brown, speaking for the Supreme Court of Minnesota, said:

> "The principal question in the case is whether plaintiff suffered a total loss. It is not claimed that the building was totally destroyed, but it is claimed that it was damaged to such an extent as to render it practically worthless without extensive repairs, and that it could not be repaired, because the building inspector refused to grant a permit authorizing the same. Defendant did not elect to repair the building, as it had a right to do under the policy, but offered to pay the cost of such repair in full settlement of its liability. The ordinances of the city of St. Paul create and establish fire limits in the city within which the city assumes a supervisory control over the kind and character of buildings to be erected therein, and of the alteration and repair of the same. Certain specified kinds or classes of buildings are prohibited from being erected therein, and conditions under which a building within such limits may be altered and repaired are specified and pointed out. A building inspector is provided for, who has control and supervision over such matters. By a fair construction of such ordinances, the inspector is empowered to condemn buildings located within the fire limits whenever, in his judgment, they have been damaged by fire or decay to the extent of 50 per cent. of their value; and when so condemned by him, and when he refuses a permit to make repairs on such a building, it is made unlawful for the owner thereof to make the same. There is no question in this case but that the insured building was within such fire limits, and no question but that the building inspector refused a permit to repair the same after the fire. Nor is there any question but that, without proper and suitable repairs, the building was rendered practically worthless by the fire. So we are confronted with the question as to the effect of such ordinances, and the action of the inspector thereunder, on the contract of insurance. The question is a new one in this State, and an examination of the books discloses very few adjudged cases on the subject in other States. We have found only the following: Insurance Co. vs. Garlington, 66 Tex. 103; Brady v. Insurance Co., 11 Mich., 445; Brown vs. Insurance Co., 1 El. & El. 853; Association vs. Rosenthal, 108 Pa. St. 474; Monteleone vs. Insurance Co., 47 La. Ann. 1563. These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurer is bound thereby. This is in line with the general doctrine that, where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract. There would seem to be no logical reason why this general rule should not apply to a case of this kind. The parties are presumed to know of the ordinances. They directly and materially affect their rights in case of a loss under the policy, and should govern and control in the adjustment and settlement of such loss. Joyce, Ins. (§3170), states the law as follows:

> 'If the policy be upon a building of such material and character and situation with relation to fire limits that it cannot be repaired, because of a city ordinance prohibiting repairs to such buildings within fire limits when damaged to the extent of one-third their value by fire, * * * and the insurers are prevented from repairing, a recovery may be had for a total loss.'

To this may be added the qualification that, if what remains of the building after the fire be of any value over and above the cost and expense of removing it, such excess value must be deducted from the recovery. The evidence on this subject is that the building was of no value whatever over and above what it would cost to take it down and remove it from the lot. There can be no question as to the authority of the city to enact the ordinances in question. They are in the interests of the public welfare and within the police power, and we adopt the view that they become an integral part of all contracts of insurance upon property within the fire limits to which they apply. Counsel for defendant does not seriously contend to the contrary."

It must be observed, however, that from the reported decision just quoted from, it does not appear that the policy

there sued on contained the provision protecting the insurer against loss caused by ordinance or law.

Another interesting case is that of

Hewins vs. London Assur. Corp.,

184 Mass. 177,

wherein the validity of the clause in question was sustained.

From the foregoing authorities, I think it is reasonably well settled that the provision of the standard policy now under discussion is valid, protects the insurer, and limits his liability to that within the language used.

"LOSS ADJUSTMENT" LECTURES

"THE TRUE PURPOSE OF THE LOSS SETTLEMENT"—Theory of Insurance. Indemnity. —*Allen E. Clough.*

"WHAT IS A FIRE LOSS?"—Direct and Consequential loss—the distinction between. No Liability for loss by interruption of business, manufacturing processes or otherwise. First lines of policy and policy condition line 42. —*W. N. Bament.*

"CASH VALUE"—Actual cash value of property at the time any loss or damage occurs. Liability is for the actual cash value of the property at the time any loss or damage occurs, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the assured to repair or replace same with material of like kind or quality. Policy condition lines, 1, 2. —*L. C. Williams.*

"THE APPRAISAL" — Appraisals — Options reserved to the company. Policy condition lines 3-5, 86-93. —*W. O. Robb.*

"THE CLAIM—THE PROOF OF LOSS—WHEN IS LOSS PAYABLE?"—The sum for which the company is liable shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by company in accordance with the terms of the policy. What is a claim and satisfactory proof of loss? Policy condition lines 2, 3, 4, 67-85, 92-95, 106-107. —*Robert J. Fox.*

"ABANDONMENT, PROTECTION AND REMOVAL OF PROPERTY"—There can be no abandonment of the property to the company, and, if the property is so endangered by fire as to require removal to a place of safety the future liability of the company in reference thereto, including its cover during and after the fire, and whether liable for the expense of the removal of the goods in danger; the duty of the assured to protect his property from further damage. Policy condition lines 5, 6, part of 32, 33, 60-66, 67, 68. —*Frederick B. Campbell.*

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"UNUSUAL AND INTERESTING FIRE LOSS CLAIMS" —*William R. Pitcher.*

"LIABILITY FOR INTERNAL REVENUE TAX AND CUSTOMS DUTY"

"NON-LIABILITY MATTER, UNLESS SPECIFICALLY ASSUMED"—No liability, unless specifically assumed on drawings, tools, implements, models, patterns, scientific apparatus, store or office furnitures, or fixtures, or property held on storage or for repairs. Policy condition lines 38-41. —*W. J. Nichols.*

"THE MORTGAGEE CLAUSES, THE STANDARD MORTGAGE CLAUSE, THE SIMPLE LOSS PAYABLE CLAUSE"—If with the consent of the company there exists under the policy an interest in the subject of insurance—in favor of others than the assured—How the preceding conditions are to be applied. Policy condition lines 56 to 59, inclusive. —*Leo Levy.*

"SUBROGATION"—And the effect of a waiver of subrogation rights. Policy condition lines 102-105. —*W. H. Van Benschoten.*

"CANCELLATION AND SUBSTITUTION" — Knowledge and authority of agent or broker. Policy condition lines 51-55. —*Martin Comboy.*

"WAIVER AND ESTOPPEL" —*W. J. Nichols.*

"THE AGENT—AUTHORITY OF AGENT AND OFFICERS OF COMPANY"—No person unless duly authorized in writing shall be deemed the agent. Policy condition lines 47, 48. This policy made and accepted subject to the foregoing stipulations, (closing paragraph of Standard Policy). —*Frederick T. Case.*

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"WHOLE INSURANCE"; NON-CONCURRENT INSURANCE—What is the "Whole Insurance"—apportionment of non-concurrent insurance. Policy Condition lines 96-98. —*Allen E. Clough.*

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